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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: MAY 17 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion to reopen and affirm the dismissal of the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was the education coordinator for Florida Certified Organic Growers and Consumers (FOG), Gainesville, Florida, and a doctoral student at the University of Florida (UF), Gainesville. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO affirmed the director's decision.

The AAO stated the prior history of this proceeding, along with the relevant statute, regulations and case law, in its September 13, 2011 dismissal notice, incorporated here by reference. The AAO will quote short passages of that decision as necessary to provide context for the present decision.

Counsel, on motion, states that the petitioner "seeks . . . to submit additional documentation and evidence to overcome the objections raised in the AAO decision and . . . to show that the Service and AAO ignored crucial evidence submitted by petitioner."

The petitioner filed the Form I-140 petition on January 21, 2010. The petitioner described himself as "one of a select percentage of bilingual professionals who have risen to the top of organic and sustainable agriculture field" and "an expert in the production and certification of organic crops under the USDA National Organic Program." The petitioner described his work as follows:

> Education coordinator (2006-present). *Florida Organic Growers and Consumers (FOG), Gainesville, FL.* Responsible for supporting and promoting organic and sustainable agricultural practices through the education of consumers, farmers, future farmers, businesses, policy makers and the general public. [The petitioner] has trained farmers and agronomists in Florida, the Southeast, the Dominican Republic, Puerto Rico and Uganda.

In the dismissal notice, the AAO noted that the petitioner had failed to submit Form ETA-750B, Statement of Qualifications of Alien, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(4)(ii). The petitioner submits this required document on motion. Because the appellate decision marked the first time USCIS raised the issue, the AAO will accept the form on motion and incorporate it into the record.

Counsel refers to an unpublished appellate decision from 1992, which, in counsel's words, "suggested seven factors to be considered" in national interest waiver applications. While the USCIS regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all

USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, *Matter of New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), published in 1998, supersedes conflicting holdings in any earlier decisions.

The AAO noted that the petitioner published six scholarly articles between 2000 and 2003, while he was a graduate student, and did not claim any subsequent publications. The director found, and the AAO agreed, that the petitioner had documented minimal citation of his published work. Counsel, in the appellate brief, had asserted that the petitioner works in "a very niche-related area and there are very few people at his level. . . . If there are not many peers, you cannot be quoted." The AAO responded that the petitioner had not provided any statistical data to support the claim, and stated:

> It cannot suffice for counsel simply to declare that citation rarely occurs in the petitioner's occupation. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).
>
> Counsel adds that much of the petitioner's recent work has centered around the relatively [redacted] and states: "Unless someone else chooses this fruit for their research his paper will not be quoted." The record contradicts the baseless assertion that every crop produces its own exclusive stream of research publications. The petitioner, in his own article [redacted]" cited 53 earlier articles. Only 16 of the cited articles mention muskmelons, melons, or the Latin name *Cucumis melo* in their titles. Other named crops include cucumbers, bell peppers, tomatoes, and strawberries, all of which are very common in the United States. The petitioner was clearly able to cite research on other crops in his own work on [redacted]

On motion, counsel offers no rebuttal to the above points. Instead, counsel pursues a novel line of reasoning, stating:

> The Service and AAO decisions make much of the fact that the Petitioner's research papers have not been widely independently cited. . . . However, we note that Petitioner is not seeking employment as a Scientist or Researcher, but rather at the time of filing was working as an Education Coordinator for the Florida Organic Growers and Consumers. . . . Therefore, an overemphasis on citation of his research as a determinant of his impact and influence in his field is not appropriate in this case.

The materials submitted on motion indicate that the petitioner no longer works for [redacted] Counsel's use of the phrase "at the time of filing [he] was working as an Education Coordinator" implies the petitioner's subsequent departure from that position, and a number of witness letters (discussed below) plainly refer to the petitioner's employment at [redacted] in the past tense.

The petitioner's departure from [redacted] is significant because, in a previously submitted letter, [redacted] stated: "Since 2006 [the petitioner] has been the Educational Coordinator for Florida Organic Growers in Gainesville Florida. It is precisely this role . . . that makes him a person in great demand not only in Florida, but also overseas." If the petitioner is no longer in "precisely this role" that formed the original basis for the waiver claim, then the petitioner must show that he has had at least equal, if not greater influence and responsibility in his subsequent position(s). The motion, however, contains no information about the petitioner's current employment. This is a significant point, as the petitioner must demonstrate prospective national benefit. The waiver is not simply a reward for past achievements.

Returning to the issue of research, prior witnesses directly involved in the petitioner's work had indicated that research was integral to his position as education coordinator. For example, [redacted] the petitioner's former supervisor at [redacted] stated that the petitioner "was the primary force behind our efforts to research sustainable agriculture methods." [redacted] executive director, [redacted], stated that the petitioner "has been an integral part in all of the research and educational projects that we have been involved with over the years."

Counsel, on motion, states that "scholarly research informs [the petitioner's] work," and that "farmers, students, and agricultural agents . . . 'cite' his work by putting his research findings into practice in the fields and farmlands rather than in the laboratory." Counsel had previously described the petitioner's impact in the future tense, stating that the petitioner's

> national interest impact will . . . be seen when he will teach our farmers skills that will lead to competitiveness that is sustainable . . . [and will] also save our federal government millions in farm subsidies that will no longer be necessary as a result of his research and development into saving water, using renewable resources, and maximizing yield per square meter. With his research, the United States will be less dependent on weather conditions and better able to compete against Canada, Mexico, Holland and Isr[ae]l, who are now taking business away from our own farmers.

The AAO had responded to the above claim by stating: "If the petitioner's work has not already had a measurable effect on crop yields, farm subsidies, etc. at a national level, then it is mere conjecture to assert that such effects are forthcoming."

Counsel states that the petitioner had previously submitted evidence that farmers and ranchers have put the petitioner's research to use, but the AAO "ignored" that evidence. The AAO had found that the petitioner had relied on witness letters rather than documentary evidence, but counsel contends that this finding "ignores the purpose of an expert letter. That is, an expert is someone . . . [who] should be able to 'speak for others in the field' and such testimony should be sufficient in and of itself without further evidence to support their claims."

Expert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to "fact" but rather is admissible only if "it will assist the trier of fact to understand the evidence or to determine a fact in issue." *Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008).

If the petitioner is responsible for widespread implementation of novel methods, then there ought to be first-hand evidence to that effect, and any witness, regardless of credentials or expertise, somehow must have come by his or her knowledge about the effect of the petitioner's work. Knowledge of the specific impact of the petitioner's work does not spontaneously or intuitively arise from a witness's expertise in the petitioner's field. If there is no independent evidence regarding the petitioner's work, then there is no source of information upon which the expert can rely. If the petitioner's work has improved crop yields or usage of resources, reduced spoilage rates, or lowered costs, then each of these changes would be objectively measurable. If, on the other hand, the petitioner's work has had no measurable effect, then it is far from evident what effect his efforts have had.

Counsel contends that the petitioner "previously submitted objective, verifiable evidence which established his achievements, impact and influence in his field." Specifically, the petitioner "submitted a certificate he received from the Ugandan Ministry of Agriculture, Animal Industry and Fisheries and the Uganda Coffee Development Authority which praised his meritorious service in conducting a national training program," as well as "documentation of his participation in the 5th National Small Farm Conference" and "USDA-funded research." The petitioner resubmits these exhibits on motion.

The named exhibits establish that the petitioner has been active in his field, but they say nothing of the results of his work. The petitioner, like many others, gave a presentation at a conference. The subject of the presentation was "making educational efforts effective for farmers and other practitioners." To claim that this presentation resulted in a significant improvement in training methodology would be to assume facts not in evidence.

Regarding the "USDA-funded research," the petitioner submits a copy of a printout from the website of the U.S. Department of Agriculture. The article reproduces a press release from the University of Florida (the author is identified as being on the "UF Staff"). The petitioner's name appears nowhere in the article. The article reported that crops grown in greenhouses have higher yields than field crops, because growers have more control over growing conditions. The article also indicated that "the new greenhouse technology is already being used in Israel and other Middle Eastern countries as well as Canada, China, Korea, Mexico and Japan." The record does not indicate that the petitioner is responsible for introducing the technology to these countries. Thus, the petitioner's role in the research appears to have been measuring the benefits of existing technology. Counsel, on motion, does not explain how this work distinguishes the petitioner from others in his field. (As noted previously, elsewhere in the same motion counsel has minimized the "research" aspect of the petitioner's work.) The petitioner has not shown that participation in government-funded research is an intrinsic mark of distinction, or that a government grant is an unusual privilege rather than a routine source of university research funding.

The certificate from Uganda indicates that the petitioner "Conduct[ed the] 1st Organic National Training Program for the Coffee Industry in Uganda." The AAO had not disputed the petitioner's

involvement in that training program, but found only that the petitioner provided minimal information about that involvement.

The petitioner submits several new exhibits, most of which are witness letters. The petitioner also submits a copy of a transcript, for informational purposes, showing that the petitioner received his doctorate in May 2011, more than a year after he filed the petition. The petitioner also submitted documentation about the USDA's Sustainable Agriculture Research and Education (SARE) Program. [redacted] (covering 13 states as well as U.S. territories in the Caribbean), stated: "I have known [the petitioner] for nearly a decade through my work with [redacted] and most recently when he was a member of the Southern Region SARE Administrative Council (AC)." The rest of the letter concerns the role of AC members. [redacted] does not say when the petitioner joined the AC, but the petitioner's prior submissions made no mention of his membership in the Southern Region SARE AC. Therefore, there is no evidence that the petitioner served on the AC prior to the petition's filing date.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, even if the petitioner had shown that his position on the SARE AC demonstrated his eligibility for the waiver (which he has not done), it would not result in approval of the petition because the available evidence does not show that the petitioner held that position prior to the petition's filing date. (If the petitioner did serve on that council before the filing date, his failure to mention it earlier would cast doubt on his new claims regarding its importance.)

Counsel categorized the other new witness letters as being from "farmers," "agricultural professionals" and "agricultural education professionals," most of them in or near Florida. In the first group, [redacted] Wellborn, Florida, stated that the petitioner "is one of a limited number of agricultural professionals who has both research and production experience with protected systems," and that the petitioner "would make an excellent crop advisor . . . in the private sector, or Extension advisor . . . in the federal or state system."

[redacted] owner of "an organic vegetable and fruit farm in Gilchrist County, Florida," states: "new and beginning farmers like myself need agriculture professionals as knowledgeable as he is in assisting us to become more economically successful and environmentally-friendly growers. . . . He is part of a small group of horticulture experts who are willing to continue to work in agricultural production."

[redacted] [the petitioner] when he was completing his master's degree at the University of Florida." [redacted] states that the petitioner "did some of the first research at UF involving 'soilless' media," leading other students to expand upon that research. [redacted] adds: "I frequently turned to [the petitioner] to help me understand how to comply with the U.S. National Organic Standards."

The above-quoted witnesses praise the petitioner in very general terms, stating that the petitioner possesses rare skills and offered useful information to farmers seeking to improve their practices.

All of the "agricultural education professionals" are on the UF faculty. [redacted], in her second letter on the petitioner's behalf, deems the petitioner "a leading professional in the agricultural and life sciences. He is preeminent with regard to both breadth and depth of experience and expertise and the quality of the contribution that he makes and will make in the future." The letter contains no details about what those contributions are.

[redacted] stated:

> I support [the petitioner's] application for permanent residence for three reasons. First, he is one of a small number of young agricultural professionals with extensive international experience. . . . Second, he has a strong background in the agricultural sciences. . . .
>
> Third, [the petitioner] has extensive experience in developing and delivering educational programs for farmers and other agricultural professionals.

[redacted] stated the petitioner's "hands on" experience and his "direct experience in training" distinguish him from others in his field.

[redacted] Sustainability, states:

> I first knew of [the petitioner's] work when he was employed as Director of Education by Florida Organic Growers and we have maintained a valuable working relationship ever since. [The petitioner's] deep involvement with the local and organic farming community assisted the University of Florida in reaching our goals with regard to the local food system.

[redacted] discusses various elements of the petitioner's work, all relating to the petitioner's impact within UF.

[redacted] states that the petitioner's "international experience . . . places him in an extraordinarily strong competitive position for assistant professor," and that his various skills and experience "would place him in a very strong competitive stance for a faculty position at virtually any major U.S. university." The AAO did not find that the petitioner lacks marketable skills; the issue is not whether the petitioner would be able to secure employment in the United States. (That being said, [redacted] does not indicate that any United States university – including UF – has actually sought to hire the petitioner in a faculty position.)

[redacted] also points to predictions "that over 50,000 scientists and professionals will be required annually to fill job vacancies in agriculture and natural resources." The assertion of a worker shortage

is an argument for obtaining rather than waiving a labor certification, which exists for the purpose of ascertaining the availability of qualified United States workers. *See NYSDOT*, 22 I&N Dec. 218.

Counsel categorizes three of the remaining witnesses as "agricultural professionals" and four as "international agricultural professionals." Two of the claimed "international agricultural professionals" are in United States possessions. [redacted], agricultural economics specialist at the University of Puerto Rico, states:

> In 2001, [the petitioner] advised a group of coffee farmers who were interested in diversifying their farms about the production of greenhouse tomatoes. Many of the farmers who attended that training are today still in business and continue to grow high quality greenhouse tomatoes. . . .
>
> I can assure you that thanks to those earlier workshops that he led, today the number of organic farmers and research[ers] has grown in Puerto Rico.

The observation that the petitioner led workshops, followed by the vague assertion that "the number of organic farmers . . . has grown [by some unspecified amount] in Puerto Rico," does not strongly support the conclusion that the petitioner, individually, is responsible for a significant proportion of that growth.

[redacted], acting district supervisor for [redacted] Virgin Islands, makes various claims about a present or potential worker shortage in the petitioner's specialty, and adds that the petitioner "was instrumental in the development of training materials and delivery of three training workshops that were conducted in St. Thomas from 2005 to 2007." [redacted] states that "the workshop [the petitioner] conducted with Puerto Rican coffee farmers . . . was an enormous success. Many of the farmers who attended that training are today still in business and continue to grow high quality greenhouse tomatoes." The latter sentence is exactly identical to a sentence in [redacted] letter, quoted above. This use of identical language, more similar than coincidence would plausibly allow, raises questions about the actual origin and authorship of the letters.

The two truly international witnesses worked directly with the petitioner. [redacted] Uganda Coffee Development Authority, states: "The University of Florida team that included [the petitioner] has been extremely useful in implementing three (3) training sessions in Uganda. [redacted] states that, after the petitioner's involvement, "more than 14,000 households have engaged in organic coffee production," resulting in "a four-fold increase in volume and value" of "organic exports to the European Union and USA." The record does not show that the petitioner was solely or primarily responsible for this increase, or that similar success lay outside the capabilities of other qualified professionals in the petitioner's field.

[redacted] Spain, states that her university has "a collaborative project with UF," and that "[b]oth the faculty members at UF and at UPM found his participation to be critical." [redacted] did not establish the broader significance of the project beyond the two universities, but asserted that the petitioner is "a critical resource for enhancing collaboration between U.S. and European institutions."

The remaining witnesses are all in Florida or North Carolina. [redacted] conservation agronomist with the Florida State Office of the USDA's Natural Resources Conservation Service, states that the petitioner "is one of the few agricultural professionals in Florida that I know with significant experience in the field of organic agriculture, organic certification, sustainable production systems and protected agriculture systems." [redacted] asserts that the petitioner "fulfills a critical need in our area," which calls back to the shortage issue, and offers the vague assertion that the petitioner has "assisted several farmers in our area to start growing organic vegetables in high tunnels."

[redacted] interim [redacted] North Carolina, "worked with [the petitioner] on projects and efforts related to disaster assistance programs and financial counseling for Florida farms . . . after the disastrous hurricanes that hit Florida in 2004 and 2005." [redacted] does not discuss the petitioner's work with organic farming and education, instead stating that the petitioner's "contributions will be especially important for small, underserved, and minority farmers who experience cultural, economic, and social barriers to gaining access to the resources they need to make their full contribution to the U.S. economy and society."

[redacted] North Carolina State University, states that the petitioner "has already shown himself to be a leader in a group that has limited low participation in the formal and informal educational systems dealing with agriculture, natural resources, and food systems." [redacted] assert that the petitioner's language skills will be helpful to Latin American farmers who may otherwise have difficulty comprehending legal documents. This assertion has little to do with the original claimed basis for the national interest waiver.

Counsel, on motion, has not shown that the AAO reached incorrect conclusions in dismissing the petitioner's appeal. The petitioner cannot overcome the AAO's findings about the limitations of witness letters by submitting still more witness letters. Attempts to shift the emphasis from research to education do not show that the AAO's prior decision was in error. The materials submitted on motion continue to indicate that the petitioner's impact has been largely local.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The AAO's decision of September 13, 2011 is affirmed. The petition remains denied.